81-2315

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

PAGE

Opinion Delivered Upon the Rendering of the Judgment Sought to Be Reviewed (Reported at 669 F.2d 93) 1a

Opinion of United States District Court for the Southern District of New York, dated and filed January 30, 1981, Denying, Without Prejudice to Renewal, Motion by Defendant Prudential Lines, Inc. to Dismiss the Complaint for Laches 14a

Opinion of United States District Court dated June 18, 1981, and filed January 19, 1981, Denying on the Merits Renewed Motion by Defendant Prudential Lines Inc. to Dismiss Complaint for Laches 19a

Amended Opinion and Order of United States District Court for the Southern District of New York, Certifying Question, in Order to Enable Immediate Interlocutory Review, dated and filed July 7, 1981 .... 24a

Order of Court of Appeals for Second Circuit, dated and filed August 11, 1981, Granting Leave to Appeal 26a

Order of U.S. Department of Labor Compensation Board, dated February 22, 1977 and filed February 25, 1977 ..... 27a

Judgment of the Court of Appeals for the Second Circuit (dated and filed January 21, 1982) Sought to Be Reviewed 32a

PAGE

Summons Filed in United States District Court for the Southern District of New York on April 28, 1980 ..... 34a

Complaint, filed April 28, 1980 ..... 35a

Answer to Complaint, filed June 6, 1980 ..... 39a

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff, on January 6, 1981, in Opposition to Motion filed by Defendant on December 16, 1980, to Dismiss Complaint for Laches 42a

Affidavit of John F. McHugh, on Behalf of Defendants, filed on January 16, 1981, in Reply to Affidavit of Martin Lassoff, filed in Opposition to Defendant's Motion to Dismiss for Laches 52a

Defendant's Renewed Notice of Motion to Dismiss Complaint (filed May 8, 1981) 61a

Affidavit of John F. McHugh filed December 16, 1980, in Support of Defendant's Renewed Motion to Dismiss Complaint 63a

Affirmation of Howard Fishkin, on Behalf of Plaintiff, filed May 19, 1981, in Opposition to Defendant's Renewed Motion to Dismiss Complaint 67a

Letter From State Insurance Fund (the Workmen's Compensation Carrier for Plaintiff's Employer), dated May 12, 1981, to Zimmerman & Zimmerman, Attorneys for Plaintiff, Ratifying Commencement and Continuance of Plaintiff's Action Against Defendant 69a

State Court Summons 71a

Opinion Delivered Upon the Rendering of the Judgment Sought to Be Reviewed (Reported at 669 F.2d 93)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 400 August Term, 1981

Argued: November 19, 1981 Decided: January 21, 1982

Docket No. 81-7591

Filed: January 21, 1982

ANGELO DEL RE,

Plaintiff-Appellee,

—against—

PRUDENTIAL LINES, INC.,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and NEWMAN,

Circuit Judges.

Appeal from an order of the Southern District of New York, Leonard B. Sand, *Judge*, denying a motion by a shipowner to dismiss a longshoreman's negligence action against it on the ground that the action was time barred by §33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §933(b). The district court certified for appeal the question of whether under Rule

Opinion Delivered Upon the Rendering of the Judgment Sought to Be Reviewed

17(a), F.R.Civ.P., an employer may ratify the commencement of an action brought by the employee in his own name and on his own behalf after the statutory period of limitations within which the employee might sue has passed and thereby prevent dismissal of the action on the ground that it is time barred.

Reversed.

WILLIAM SONENSHINE, Esq., New York, NY (Bernard Klieger, Esq., Klieger & Hartman, New York, NY, of counsel), *for Defendant-Appellant.*

MARTIN LASSOFF, Esq., New York, NY (Howard Fishkin, Esq., Zimmerman & Zimmerman, New York, NY, of counsel), *for Plaintiff-Appellee.*

WALKER & CORSA, New York, NY (Joseph T. Stearns, Esq., Sandra R. M. Gluck, Esq., New York, NY, of counsel), *for Amicus Curiae Central Gulf Steamship Corp., Bay Tankers, Inc., Seatrain Lines Inc., Moore-McCormack Lines, Inc.* and *Apex Marine Corp.*

MANSFIELD, *Circuit Judge*:

This is another in a series of cases[1] in which we have been required to interpret the statutory scheme Congress

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[1] See *Rodrigues* v. *Compass Shipping Co. Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, —— U.S. ——, 68 L.Ed.2d 472 (1981); *Verderame* v. *Torm Lines*, —— F.2d ——, No. 80-9061, Slip Op. at —— (Jan. 20, 1982).

established to compensate longshoremen and certain other maritime workers for work-related injuries. Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §933(b) (the "Act"), provides that "all right" that a longshoreman has to sue a negligent third party (usually a shipowner) for personal injury damages is automatically assigned to his employer unless the longshoreman commences an action against the third party within six months after he accepts compensation under an award in a compensation order of the Benefits Review Board.[1]

Prudential Lines, Inc. ("Prudential"), a shipowner, appeals from an order of the Southern District of New York, Leonard B. Sand, *Judge*, denying its motion to dismiss an action for damages for personal injuries by Angelo Del Re, a longshoreman, against it on the ground that the action is barred by §33(b)'s six-month time bar. The district court certified for appeal pursuant to 28 U.S.C. §1292(b) the question of whether under Rule 17(a), F.R.Civ.P., an employer may prevent dismissal under §33(b) by "ratifying" the employee's commencement of an action in his own name and on his own behalf after the statutory period limiting his right to sue has passed. Because Rule 17(a) in no way permits the circumvention of what we believe to be §33(b)'s absolute bar to suits by a longshoreman more than six

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[1] Section 33(b) provides:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

months after he receives an award in a compensation order, we reverse.

Del Re was injured on March 7, 1975, while working for Northeast Stevedores, Inc. on a ship owned by Prudential. As a result of this accident Del Re was unable to work for 29 weeks and suffered permanent injury to his right arm and both of his legs. Northeast's insurance carrier, The State Insurance Fund, paid Del Re interim compensation during the period he was unable to work. On February 25, 1977, the Deputy Commissioner, Second Compensation District, of the U.S. Department of Labor approved an award of $13,935.58 and filed an award in a compensation order.

On October 17, 1977, Del Re commenced a personal injury negligence action against Prudential in the Supreme Court of New York. *Prudential did not respond in any way to the suit, but Del Re did not seek a default judgment.* On April 28, 1980, he commenced the instant federal action in the Southern District of New York. His action was brought in his own name, seeking damages on his own behalf for injuries in the course of his employment as a stevedore on March 7, 1975, aboard Prudential's ship S.S. Santa Barbara.

Prudential immediately moved to dismiss the action on grounds of laches and failure to bring the suit within six months after Del Re's receipt of the award under the Department of Labor compensation order, as required by §33(b). Since Prudential was unable at that time to show when the award in the compensation order was filed or when the settlement was agreed to by the parties, Judge Sand on January 30, 1981, denied the motion without prejudice to renewal. He further decided that the laches issue could best be decided after a trial. After the judge indi-

cated that Del Re should elect within 15 days whether he wished to seek a default judgment in the state court proceeding or to litigate in federal court, the parties filed a stipulation discontinuing the state court action.

After obtaining a copy of the compensation order, which was dated February 25, 1977, Prudential renewed its motion to dismiss, relying on the facts that the state court action was commenced on October 17, 1977, and the federal court action was commenced on April 28, 1980, both more than six months after the compensation award was filed. Del Re responded to the motion by obtaining a letter from Northeast's insurance carrier, The State Insurance Fund (which as subrogee of Northeast pursuant to 33 U.S.C. §933(h) was the sole possessor of the right to sue Prudential for Del Re's injuries) purporting to "ratify" the commencement of "his" action in his own behalf. Del Re argued that under Rule 17(a), F.R.Civ.P., The State Insurance Fund, the real party in interest, cured the admitted defect in the suit by ratifying his commencement of it, even though it was commenced on his own behalf. In an opinion dated June 18, 1981, Judge Sand agreed, denying Prudential's motion to dismiss but stating:

> "We are by no means unmindful of the paradox which results: the insurer cannot institute an action in its own name because the statute of limitations bars such a proceeding; the longshoreman cannot maintain an action in his own name because more than six months have elapsed since receipt of the compensation award; although neither the insurer nor the longshoreman, proceeding alone, can maintain the action, the consequence of the longshoreman having brought an action within the period of the statute of limitation in con-

junction with the ratification by the insurer, permits the action to be resuscitated under F.R.Civ.P. 17(a).[3]

Prudential then applied to have the question certified to this court pursuant to 28 U.S.C. §1292(b), which Judge Sand granted on July 7, 1981. We granted leave to appeal on August 11, 1981.

Discussion

Section 33(b) of the Act states in no uncertain terms that, unless an injured longshoreman brings suit against a third party within six months after receiving an award in a compensation order, all his rights against the third party are automatically assigned to his employer;[4] a longshoreman has no right thereafter to sue the third party. As the Supreme Court noted in *Rodriguez* v. *Compass Shipping Co. Ltd.*, —— U.S. ——, 68 L.Ed.2d 472, 487-88 (1981), the Longshoremen's and Harbor Workers' Compensation Act reflects a balancing of the conflicting interests of longshoremen, stevedore-employers, and shipowners. Congress' enactment in 1959 of the six-month rule benefited the injured longshoreman by allowing him time, after learning how much compensation he would receive from his employer, to decide whether to bring suit against the shipowner. Prior thereto the longshoreman's right to sue was terminated immediately upon receipt of the award. *Rodriguez* v. *Com-*

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[3] The district court's statement that an action by the employer would be barred by a state statute of limitations is incorrect. Such an action would be in admiralty and governed by the doctrine of laches. See *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525, 533 (1956); *Hill* v. *W. Bruns & Co.*, 498 F.2d 565, 568 (2d Cir. 1974).

[4] See note 2 *supra*.

pass Shipping Co. Ltd., supra, —— U.S. at ——, 68 L.Ed.2d at 480; *Bloomer* v. *Liberty Mutual Ins. Co.,* 445 U.S. 74 (1980). But the six-month provision, while according the longshoreman a fixed period of time within which to make up his mind on whether to sue, also forces him to make his decision with reasonable promptness, thereby benefiting the shipowner, who desires a prompt resolution of all claims, and the stevedore-employer, who does not want to be delayed unduly in deciding whether himself to sue the shipowner for damages. Under the Act a successful recovery by the stevedore-employer would be applied toward reimbursement of any compensation payments made by it or its subrogated insurance carrier to the longshoreman and toward a reasonable attorney's fee, with 20% of any remaining balance being retained by the stevedore-employer and 80% paid to the longshoreman, 33 U.S.C. §33(e).

Thus §33(b)'s six-month rule represents a balancing of interests. Various provisions of the Act, while apparently unrelated, represent legislative trade-offs between the interests of these three concerned parties. Accordingly, we must tread warily when interpreting the Act and "adhere closely to what Congress has written." *Rodriguez* v. *Compass Shipping Co. Ltd., supra,* —— U.S. at ——, 68 L.Ed.2d at 488.

In *Rodriguez* v. *Compass Shipping Co. Ltd.,* 617 F.2d 955 (2d Cir. 1980), *aff'd,* —— U.S. ——, 68 L.Ed.2d 472 (1981), we considered whether, in spite of the clear language of §33(b), a longshoreman might be able to bring suit after the six-month period had passed. Rodriguez argued that his employer's failure to sue indicated a conflict of interest between him and it and that as a matter of public policy

the right to sue, when the stevedore-employer refuses to pursue it, should be reassigned as a matter of law to the longshoreman, relying upon *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956). We rejected that argument, noting that *Czaplicki* involved a real conflict of interest: the employer's insurer, which by subrogation had acquired the employer's exclusive right to sue, was also the insurer of the shipowner's contractor, who faced liability as a defendant and as an indemnitor of the shipowner. Thus in *Czaplicki* the party holding the right to sue would have been suing itself if it had exercised that right. Moreover, at the time *Czaplicki* was decided, a shipowner could seek indemnity from an employer-stevedore for any damages it was required to pay to the employee, with the result that the employer might ultimately have to pay any damages that might be awarded. Thus, even without the "same insurer" conflict of interest, a stevedore-employer would have been unlikely to bring suit when *Czaplicki* was decided. These factors were no longer present when we decided *Rodriguez*. We therefore adhered to the statutory framework and held that at the expiration of the six-month period a longshoreman is completely divested of any rights he once had to bring suit against a shipowner.

On appeal the Supreme Court affirmed our decision and rejected the Fourth Circuit's attempt to fashion a longshoreman's right to demand reassignment when his stevedore-employer refuses to sue the shipowner. *Rodriguez, supra*, —— U.S. ——, 68 L.Ed.2d 472. The Court noted the delicate balancing of interests by Congress in §33(b). While holding out the possibility that *Czaplicki* might still be good law when an actual conflict of interest existed, it rejected "the fashioning of an entirely new set of remedies

to deal with an aspect of a problem that Congress expressly addressed." *Id.* at 486. It interpreted §33(b) as "an unequivocal statutory bar" to longshoreman suits against third parties after the passage of the six-month period. *Id.*

Against this background we are faced with Del Re's claim that §33(b) may be circumvented by a "ratification" of his action by the stevedore-employer, as the "real party in interest," pursuant to Rule 17(a), F.R.Civ.P. It was on this theory that the district court based its decision to deny Prudential's motion to dismiss, relying heavily on *Motta* v. *Resource Shipping & Enterprises Co.*, 499 F. Supp. 1365 (S.D.N.Y. 1980). Rule 17(a) provides in pertinent part that:

> "Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

The Advisory Committee made clear in its accompanying Note that the provision allowing ratification, joinder, and substitution "is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." The purpose of this "exception" to the requirement that all actions be prosecuted in the name of the real party in interest is therefore not to create new substantive rights, but to avoid

forfeiture in situations in which it is unclear at the time the action is filed who had the right to sue and it is subsequently determined that the right belonged to a party other than the party that instituted the action. See *Hoddin* v. *Policy Jury*, 49 F.R.D. 176, 180 (W.D. La. 1970) (3-judge court); C. Wright & A. Miller, *Federal Practice and Procedure* §555, at 707-08.

No difficulty, confusion or mistake ever existed in the present case regarding the identity of the party in whose name the suit must be brought. Section 33(b) was at all relevant times explicit and unequivocal in providing that only the employer-stevedore or its insurer may bring this action after the six-month period has passed, and we had so held in *Rodriguez, supra.*[5] Del Re and his employer are not merely different parties with the same claim. They are different parties with different claims. Moreover, allowing ratification under Rule 17 would violate 28 U.S.C. §2072 which provides that federal rules of court "shall not . . . enlarge . . . any substantive right."

The term "ratification" implies that the stevedore-employer is the party in interest for whom the present action was commenced, whereas in fact Del Re brought suit in his own name to benefit himself, not his employer or its subrogated insurer. If the suit had proceeded in his own

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[5] In addition to the district court's decision in *Rodriguez*, 456 F. Supp. 1014 (S.D.N.Y. 1978), the following other cases, in which Zimmerman and Zimmerman were counsel for the plaintiffs, had held that a longshoreman, by failing to bring suit within six months after an award, had lost his right to sue: *Panzella* v. *Skou*, 471 F. Supp. 303 (S.D.N.Y. 1979) (Werker, J.); *Francavilla* v. *Bank Line, Ltd.*, 470 F. Supp. 94 (S.D.N.Y. 1979) (Duffy, J.); *Perez* v. *Arya National Shipping Lines, Inc.*, 468 F. Supp. 799 (S.D.N.Y. 1979) (Lasker, J.); *Perez* v. *Costa Armatori, S.P.A.*, 465 F. Supp. 1211 (S.D.N.Y. 1979) (Knapp, J.).

name as the real party in interest (as he and his counsel originally intended), he would have claimed 100% of any recovery, subject to the insurer's lien for compensation paid him. A suit by the employer under the Act, on the other hand, would be of different dimensions, since 20% of any recovery over and above compensation recouped and an attorney's fee would be retained by the employer. Moreover, the fee payable to the attorney in a suit by the employer would be lower than that payable by Del Re in a suit brought in his own behalf.

To give effect to such a "ratification" would defeat the purposes of the Act as amended in 1959 and in 1972. One of these was to reduce the flood of longshoremen's litigation that had "congested courts," in which "the primary beneficiaries had been lawyers, not injured longshoremen," *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 83-86 (1980); Hearings, Select Subcommittee on Labor of the House Committee on Education and Labor, 92nd Cong., 2d Sess., 106 (1972). A second was to reduce the heavy expenses formerly incurred in defending these suits and thus increase the level of compensation benefits to longshoremen. The district court erroneously assumed, relying on the reasoning of *Motta*, with which we disagree, that the Act was amended solely for the protection and benefit of the longshoreman and his employer and not for that of the third-party shipowner. Congress devised a statutory scheme intended to balance the interests of all three. *Rodriguez* v. *Compass Shipping Co. Ltd.*, *supra*, —— U.S. at ——, 68 L.Ed.2d at 487-88. "One of the consequences of such an assignment [from the longshoreman to the stevedore-employer under §33(b)] is the risk that the employer will choose not to sue." *Id.*, 68 L.Ed.2d at 485-86. The

shipowner was to be benefited by the six months statutory bar in §33(b) to the extent that, once the longshoreman's right was irrevocably assigned by the statute to his stevedore-employer, not only did the stevedore's right thereafter differ in character from that of the longshoreman but the likelihood of a suit thereafter by the stevedore-employer would be greatly reduced.

Only when there is a likelihood of a recovery large enough to cover legal fees and the compensation paid would the stevedore have an incentive to sue the shipowner. Moreover, stevedores, who are hired by shipowners, are usually reluctant to jeopardize their business relations with shipowners by instituting suits on their own behalf against them. Attorneys are less willing to represent stevedore-employers in such suits, since their lawyers are limited by the statute to recovery of a "reasonable . . . fee as determined by the deputy commissioner or Board," §33(e)(1)(A), 33 U.S.C. §933(e)(1)(A), than to bring suits on behalf of longshoremen, in which the usual arrangement is a third-contingent fee. The stevedore-employer, moreover, may be unwilling (or less willing than the longshoreman) to incur costs and other expenses when the ultimate benefit to it, even if it is successful, is so limited.

Under the "ratification" theory this would be changed. Since the action is brought by the longshoreman rather than by his stevedore-employer, the latter assumes no risk at all by "ratifying" it. If the suit is unsuccessful, the longshoreman-employee, as Del Re concedes, assumes the full burden of paying the costs and expenses of the action; if, on the other hand, the suit is successful, his attorney would claim not to be bound by §33(e)'s limitation on his fee. The effect would be to reintroduce the flood of long-

shoremen's suits which Congress sought to reduce by its amendment of the Act. In addition to reopening the floodgates of wasteful litigation which Congress sought to eliminate, the ratification theory would raise new procedural issues, such as whether the Act's requirement that the attorney's fee incurred by a stevedore be approved by the deputy commissioner or board, §33(e)(1)(A), 33 U.S.C. §933(e)(1)(A), and its provision for 80%-20% division of any balance over compensation paid, §533(e), 33 U.S.C. §933(e), apply to a "ratified" suit prosecuted by a longshoreman, and whether the longshoreman or the stevedore is responsible for the fee of the attorney prosecuting the claim.

For these reasons the purported "ratification" under Rule 17(a) must be rejected. We adhere to the principle of *Rodriguez*, that if a longshoreman fails to bring suit within six months after receiving a compensation award he loses completely his right to sue the shipowner. Thereafter only the employer-stevedore or its subrogated insurer may institute such an action.

The certified question is answered in the negative. The order of the district court is reversed and the case is remanded with directions to dismiss the complaint.

Opinion of United States District Court for the Southern District of New York, dated and filed January 30, 1981, Denying, Without Prejudice to Renewal, Motion by Defendant Prudential Lines, Inc. to Dismiss the Complaint for Laches

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 CIV 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

OPINION FILED JANUARY 30, 1981

APPEARANCES:

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MARTIN LASSOFF, ESQ.

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Opinion of United States District Court for the Southern District of New York, dated and filed January 30, 1981, Etc.

SAND, J.

This motion by defendant Prudential Lines to dismiss the complaint on the grounds of laches is but one of a number of such motions brought before different judges of this Court arising out of its claims practice procedures adopted by defendant and Zimmerman & Zimmerman, Esqs., attorneys who represent many longshoremen in personal injury actions. Since such motions are addressed to the equitable discretion of the Court and the facts differ somewhat and since the arrangement between Prudential and Zimmerman & Zimmerman appears to have been somewhat loose and ambiguous, it is not surprising that the motions have been granted in some instances (*e.g., Secoundi* v. *Prudential Lines*, 80 Civ. 2799, Dec. 23, 1980, per Pierce, D.J.) and denied in others. (*E.g., Fernandez* v. *Prudential Lines, Inc.*, 80 Civ. 2350, Jan. 12, 1981, per Cannella, D.J.; "In short, it appears that counsel for both parties are equally culpable for the delay in pursuing this claim. To dismiss plaintiff's claim at this point would only result in harm to the plaintiff, which the Court finds particularly inequitable in light of the history of this case." p.5).

On balance, although the issue is not free from doubt, we have determined that the motion should be denied without prejudice to renewal at the conclusion of the trial.

In the exercise of its discretion, under the criteria set forth in *Public Administrator of the County of New York* v. *Angela Compania Naviera, S.A.*, 592 F.2d 58 (2d Cir. 1979) and *Larios* v. *Victory Carriers, Inc.*, 316 F.2d 62 (2d Cir. 1963) this Court must consider such matters as excuse for delay, and the extent to which the defendant made a timely investigation of the claim or actually suffers prejudice as a

result of plaintiff's alleged dilatoriness. These matters are disputed and not readily resolvable on a motion.

One alternative would be to hold a hearing on the laches defense. *Cf. Carbonaro* v. *Prudential Lines, Inc.*, 78 Civ. 4655 (LWP) (S.D.N.Y. 1980). However, we believe that the trial itself will better resolve many, if not all, of these issues and will probably be but slightly longer than such a hearing.

We recognize the dilemma in which this places defendant. The more vigorous and informed its defense at the trial, the weaker its position will be with respect to laches. Yet, if it does not vigorously defend the action, it runs the risk of a substantial judgment. Were this the usual laches motion, in which the defendant has not participated in the practices which have occasioned the delays, we would not subject the defendant to the costs of defense and to the predicament noted above before resolving the question. However, the usual nature of the dealings between the defendant and Zimmerman & Zimmerman satisfies the Court that this disposition best serves the interests of equity.

In the affidavit of Martin Lassoff of Zimmerman & Zimmerman in opposition to the motion, reference is made to an action commenced by plaintiff in the state court [presumably to avoid the statute of limitations and pursuant to a pattern established by defendant and Zimmerman & Zimmerman] and to the fact that the defendant was in default in that action, which plaintiff asserts, and defendant denies, is still viable.

Mr. Lassoff asserts:

> "The summons issuing out of the Supreme Court, New York County commenced this action on October 14, 1977 and is still in effect and is a legal and proper

commencement of an action. A further complaint in Supreme Court, New York County was served on the defendant on December 12, 1980 and defendant has failed to answer this complaint.

This action being prior in time to the Federal Court action is the action in which plaintiff chooses to proceed and will proceed at this time to take a default judgment against the defendant for its failure to appear although properly served in the Supreme Court of the State of New York."

This position would appear to be inconsistent with the conclusion of Mr. Lassoff's affidavit in which he urges that the case proceed expeditiously to trial in this Court. We will treat the quoted passage from the affidavit as being mere rhetoric. If, however, plaintiff in fact contemplates moving for a default judgment in state court, we wish to be advised of such intention in writing within fifteen (15) days from the date hereof. We will in such event place this action on the suspense docket of this Court pending resolution of the state court proceedings. If plaintiff is not going to proceed with any application in the state court proceeding, that action should be discontinued.

Motion to dismiss on the grounds of laches is denied without prejudice to renewal at the close of the trial. The motion to dismiss on the grounds of the failure to bring this action within six months of the termination of compensation payments is also denied without prejudice to renewal. The strongest allegation defendant can make in this regard is that "there is strong indication that this action" was not timely filed. Affidavit of John F. McHugh, Esq., in support of motion, ¶ 21.

Opinion of United States District Court for the Southern District of New York, dated and filed January 30, 1981, Etc.

All discovery is to be completed in ninety (90) days and a pre-trial order is then to be submitted.

So Ordered.

Dated: New York, New York
January 30, 1981

Leonard B. Sand
U.S.D.J.

Opinion of United States District Court dated June 18, 1981, and filed January 19, 1981, Denying on the Merits Renewed Motion by Defendant Prudential Lines Inc. to Dismiss Complaint for Laches

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 CIV 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

OPINION FILED JUNE 19, 1981

APPEARANCES:

For the Plaintiff:

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MARTIN LASSOFF, ESQ.

For the Defendant:

JOHN F. MCHUGH, ESQ.
One World Trade Center
New York, New York 10048

SAND, J.

In our opinion dated January 30, 1981, we denied defendant's motion to dismiss on the grounds of failure to bring

this action within six months of termination of compensation benefits wtihout prejudice to renewal, noting that the strongest allegation that defendant could then make is that "there is strong indication that this action was not timely filed".

Defendant renews this motion stating that it has now received the plaintiff's compensation records and it appears that more than six months elapsed between the date of the final compensation payment to plaintiff and the commencement of this action (or the earlier, since dismissed, state court action). Thus, pursuant to 33 U.S.C. § 933(b), defendant asserts that the cause of action has been assigned to the employer and plaintiff cannot maintain this action since he is not the real party in interest. *Rodriguez* v. *Compass Shipping Co.* —— U.S. ——, 49 U.S.L.W. 4527 (May 18, 1981).

Plaintiff resists this motion by furnishing to the Court (Exhibit i to Affidavit of Howard Fishkin, Esq. in Opposition) a letter dated May 12, 1981 from the State Insurance Fund, the Longshoremen's Act Insurer of plaintiff's employer, ratifying plaintiff's commencement and continuance of his action, agreeing not to institute a separate action, to be bound by any judgment or release obtained or executed in this action, and asserting its lien and credit rights to any recovery in this proceeding. The State Insurance Fund is subrogated to all rights of the employer pursuant to 33 U.S.C. § 933(h).

Plaintiff cites a number of decisions in this district rendered after the Court of Appeals decision in *Rodriguez*, 617 F.2d 955 (2d Cir. 1980) but prior to the Supreme Court's affirmance, upholding the efficacy of such a ratification. *See Marullo* v. *Reederei*, 79 Civ. 3757 (Goettel, J.); *Motta* v.

Resource Shipping and Enterprises Co., 76 Civ. 5217 (Tenney, J.). *See also DeLuzio* v. *Trans-American Trailer, Inc.*, Sup.Ct. N.Y.Co., County Clerk No. 12339/80 (Altman, J.); *Sucino* v. *Akrion Shipping Co.*, Sup.Ct. N.Y.Co., County Clerk No. 13029/80 (Wallach, J.). Defendant asserts, however, that the Supreme Court's subsequent opinion, especially insofar as it rejects (at 49 U.S.L.W. 4531-4532) the reasoning of the Court of Appeals for the Fourth Circuit in *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), supersedes these holdings.

Our reading of the Supreme Court *Rodriguez* decision and its discussion of the *Caldwell* case, however, leads us to conclude that, although the Court specifically rejected the Fourth Circuit's view that a longshoreman had the right (after his employer failed to institute suit following the expiration of the six month period) to compel such a suit or to have his cause of action revested, it did not specifically deal with that portion of the *Caldwell* decision which held that an actual reassignment by the employer would be efficacious. *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d at 1047-1048.

We conclude, therefore, that the question is not foreclosed by *Rodriguez*. We are also of the opinion that the ratification here should be effective and be accorded the same treatment as was the identically worded document from the same insurance carrier in *Motto* v. *Resource Shipping Enterprises Co., supra*, for the reasons set forth in Judge Tenney's comprehensive and persuasive opinion in that case.

Defendant also asserts that the ratification procedure attempted by State Insurance Fund is not recognized in New York and is a violation of the prohibition against transfer of personal injury claims. *See* New York General Obliga-

tions Law, § 13-101. In support of this contention, the defendant cites the decision by Judge Kassall in *Alongi* v. *McAllister Lighterage Line, Inc.*, Sup.Ct. N.Y.Co. No. 13211/79. There Judge Kassall wrote, "the ratification procedure attempted by Gulf, although expressly authorized under F.R.C.P. 17(a) is not recognized in New York. Since any transfer of a personal injury claim would be void in this state, New York GOL § 13-101, Gulf is precluded from assigning the action and must bring suit in its own name." But the matter before this Court *is* a matter which arises under F.R.C.P. 17(a). We note that the other state courts which have considered this matter have not invoked the General Obligations Law prohibition against assignment of personal injury claims nor do we believe that the procedure here is the type of personal injury claim assignment which the statute sought, for sound policy reasons, to prohibit. (We note that the Fourth Circuit in *Caldwell*, rejected a similar contention that a state prohibition against assignment of personal injury claims precluded the stevedore's assignment of the claim, reaching this conclusion without deciding whether state or federal law controls the question. *Caldwell, supra*, 618 F.2d at 1048, n.13.)

We realize that in cases of this sort, the net effect of the *Rodriguez* litigation may have been to march the troops up the hill only to march them down again. We have no basis for determining with what frequency or under what circumstances the insurer of the employer of the injured longshoreman will grant or withhold ratification. We are by no means unmindful of the paradox which results: the insurer cannot institute an action in its own name because the statute of limitations bars such a proceeding; the longshoreman cannot maintain an action in his own name because more

than six months have elapsed since receipt of the compensation award; although neither the insurer nor the longshoreman, proceeding alone, can maintain the action, the consequence of the longshoreman having brought an action within the period of the statute of limitations in conjunction with the ratification by the insurer, permits the action to be resuscitated under F.R.Civ.P. 17(a).

If the consequence of this practice is in essence, to nullify *Rodriguez*, and if that result is deemed to be undersirable or contrary to the interests of either the public, the industry, or the understandings embodied in the Longshoremen's and Harbor Workers Compensation Act, this is a matter which Congress should address as part of its pending review of the alleged deficiencies and incongruities which are present in that Act.

Motion denied.

So Ordered.

Dated: New York, New York
June 18, 1981

Leonard B. Sand
U.S.D.J.

Amended Opinion and Order of United States District Court for the Southern District of New York, Certifying Question, in Order to Enable Immediate Interlocutory Review, dated and filed July 7, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
80 CIV 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

Filed July 7, 1981

APPEARANCES:

For the Plaintiff:
ZIMMERMAN & ZIMMERMAN
160 Broadway
New York, New York 10038
MARTIN LASSOFF, ESQ.

For the Defendant:
JOHN F. MCHUGH, ESQ.
One World Trade Center
New York, New York 10048

SAND, J.

On June 18, 1981 we denied defendant's motion to dismiss, holding that the ratification of the suit by the Long-

Amended Opinion and Order of United States District Court, for the Southern District of New York, Certifying Question, in Order to Enable Immediate Interlocutory Review, dated and filed July 7, 1981

shoremen's Act Insurer of plaintiff's employer "permits the action to be resuscitated under F.R.Civ.P. 17(a)." Opinion, p. 4. Defendant has asked that we enter an order pursuant to 28 U.S.C. § 1292(b) certifying the question to enable immediate interlocutory review. Plaintiff opposes this application but states no reasons for the adoption of this position.

We are indeed of the opinion that the order embodied in our opinion of June 18, 1981 denying defendant's motion to dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion, *i.e.*, whether a longshoreman's personal injury claim commenced within the period of the statute of limitations but more than six months after receipt of compensation benefits may be maintained pursuant to F.R. Civ.P. 17(a) where the Longshoremen's Act Insurer of plaintiff's employer (as to whom the statute of limitations would bar an independent action ratifies plaintiff's suit. This Court is further of the opinion that an immediate appeal from this order may materially advance the ultimate determination of the litigation.

Defendant's application to have the question certified is granted and our opinion of June 18, 1981 is hereby amended to include the aforesaid findings.

So Ordered.

Dated: New York, New York
July 7, 1981

Leonard B. Sand
U.S.D.J.

Order of Court of Appeals for Second Circuit, dated and filed August 11, 1981, Granting Leave to Appeal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

81-8111

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

Filed August 11, 1981

IT IS HEREBY ORDERED that motion dated July 17, 1981 for leave to appeal be and it hereby is granted.

Dated: 8/11/81

ELLSWORTH A. VAN GRAAFEILAND
U.S.C.J.

AMALYA L. KEARSE
U.S.C.J.

HOWARD J. MARKEY
Ch. J., USCC & PA

Order of U.S. Department of Labor Compensation Board, dated February 22, 1977 and filed February 25, 1977

COMPENSATION ORDER

AWARD OF COMPENSATION

CASE No. 2-39033

ACT: LHWCA

ANGELO DEL RE,

Claimant,

v.

NORTHEAST STEVEDORING,

Employer,

THE STATE INSURANCE FUND,

Insurance Carrier.

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on March 7, 1975, the claimant above-named was in the employ of the employer above-named at Pier 39, Brooklyn, New York in the 2nd Compensation District,

Order of U.S. Department of Labor Compensation Board, dated February 22, 1977 and filed February 25, 1977

established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended and extended, that the liability of the employer for compensation under the said Act was insured by the State Insurance Fund.

2. That on said day the claimant, while performing service as a Longshore worker for the employer, sustained an injury to the legs and right arm and such injury comes within the purview of the above Act.

3. The requirements of notice of the injury to the employer have been met.

4. The employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7 of the said Act.

5. The average weekly wage of the claimant at the time of injury was $141.83;

As a result of the injury the claimant was wholly disabled from March 8, 1975, to September 29, 1975, inclusive for which he is entitled to compensation for temporary total disability for 29-3/7 weeks, at $94.55 per week, in the amount of $2,782.47.

As a further result of the injury the claimant has a permanent partial disability equivalent to 17½ percent loss of use of the right arm 13½ percent loss of use of the right leg and 8½ percent loss of use of the left leg, for which he is entitled to compensation for 54.6 weeks (17½ percent of 312 weeks), 38.88 weeks (13½ percent

Order of U.S. Department of Labor Compensation Board, dated February 22, 1977 and filed February 25, 1977

of 288 weeks), and 24.48 weeks (8½ percent of 288 weeks) at $94.55 per week, in the amount of $11,153.11.

Accrued compensation for temporary total, and permanent partial disability amounts to $13,935.58. The employer and the insurance carrier have paid $3,090.00 to the claimant as compensation, ($307.53 of which was an overpayment which carrier has agreed to waive).

Upon the foregoing findings of fact the Deputy Commissioner makes the following AWARD.

The employer, the Northeast Stevedoring, and the insurance carrier, the State Insurance Fund shall pay to the claimant compensation as follows: For temporary total disability from March 8, 1975, to September 29, 1975, inclusive 29-3/7 weeks at $94.55 per week, and permanent partial disability 117.96 weeks at $94.55 per week; a total of $13,935.58.

The employer and the insurance carrier having paid $2,782.47 excluding $307.53 overpaid, to the claimant as compensation shall pay forthwith $11,153.11, whereupon

AUDIT & REVIEW DIVISION

	APPROVED BY
$14,243.11	2/25/77

(Waived)

the file of Angelo Del Re will be CLOSED, subject to the limitations of the Act.

A fee of $710.00, to include medical expenses, is approved in favor of John Gargano, Representative, for services rendered on behalf of the claimant, and is not a lien on the award.

Order of U.S. Department of Labor Compensation Board, dated February 23, 1977 and filed February 25, 1977

Given under my hand at 1515 Broadway New York, N.Y. this 25th day of February, 1977.

/s/ ANTHONY F. CAMPO
Anthony F. Campo
Deputy Commissioner
2nd Compensation District

Carrier's No.: 9461 233-45
Mailed 2/25/77

/s/ JOHN G. PROVENZA
Claims Examiner

CERTIFICATE OF FILING AND SERVICE OF AFORESAID ORDER OF U.S. DEPARTMENT OF LABOR COMPENSATION BOARD

I certify that on February 25, 1977 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 2nd Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Angelo Del Re
Claimant

John Gargano
Representative

The State Insurance Fund
Insurance Carrier or Employer (if self-insured)

A copy was also mailed by regular mail to the following: Director, Office of Workers' Compensation Programs, (LHWCA), U.S. Department of Labor, Washington, D.C. 20211

/s/ ANTHONY F. CAMPO
Anthony F. Campo
Deputy Commissioner
2nd Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the Deputy Commissioner files the decision or order in his office.

Judgment of the Court of Appeals for the Second Circuit (dated and filed January 21, 1982) Sought to Be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of January one thousand nine hundred and eighty-two

Present:

HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. JON O. NEWMAN

Circuit Judges,

Filed January 21, 1982

#81-7591

ANGELO DEL RE,

Plaintiff-Appellee,

v.

PRUDENTIAL LINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Judgment of the Court of Appeals for the Second Circuit, dated and filed January 21, 1982 Sought to Be Reviewed

Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A Daniel Fusaro, Clerk

/s/ Edward J. Guardaro
Edward J. Guardaro
Deputy Clerk

Summons Filed in United States District Court for the Southern District of New York on April 28, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

J. SAND
80 CIV 2349

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Zimmerman & Zimmerman plaintiff's attorney, whose address 160 Broadway, New York City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in this complaint.

RAYMOND F. BURGHARDT
Clerk of Court.

J. McMAHON
Deputy Clerk.

[Seal of Court]

Date: Apr 28 1980

Complaint, filed April 28, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

J. SAND
80 CIV 2349

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

PLAINTIFF DEMANDS A TRIAL BY JURY

PLAINTIFF, complaining of defendant above named, by ZIMMERMAN & ZIMMERMAN, his attorneys, respectfully alleges:

I. Upon information and belief, defendant is a domestic corporation.

II. Upon information and belief, defendant has its principal place of business in the Borough of Manhattan, City of New York.

III. Plaintiff is a non-citizen.

IV. That the matter in controversy, exclusive of interest and costs, exceeds the sum of TEN THOUSAND ($10,000.00) DOLLARS.

V. Upon information and belief, that at all the times herein mentioned, and prior thereto, defendant was the owner of the vessel the SS SANTA BARBARA.

Complaint, filed April 28, 1980

VI. Upon information and belief, that at all the times herein mentioned, and prior thereto, defendant manned said vessels and its master, officers and crew were on board said vessel and in possession of same.

VII. Upon information and belief, that at all the times herein mentioned, and prior thereto, defendant managed, operated, maintained and controlled said vessel.

VIII. Upon information and belief, that at all the times herein mentioned, and prior thereto, said SS SANTA BARBARA was docked at the 39th Street Terminal, Brooklyn, New York, and stevedoring work was being performed thereon.

IX. Upon information and belief, that at all the times herein mentioned, said stevedoring work on board said vessel was being performed by NORTHEAST STEVEDORING Co. INC. pursuant to agreement with defendant or its agents.

X. Upon information and belief, that at all the times herein mentioned, and prior thereto, said stevedoring work on board said vessel, was being performed under the general supervision and direction of defendant, his agents, employees, the master, officers and crew of said vessel.

XI. That at all the times herein mentioned, and prior thereto, Plaintiff was employed as a longshoreman by said NORTHEAST STEVEDORING CORP., INC., and in the course of the performance of his duties was lawfully at the string piece of said vessel next to hatch No. 3 thereof.

XII. Upon information and belief, that at all the times herein mentioned, and prior thereto, said hatch No. 3 of said vessel, and the winches, drums, brakes, gears, falls, booms and appurtenances of said hatch No. 3 were a part of said vessel, and were maintained by the defendant.

Complaint, filed April 28, 1980

XIII. Upon information and belief, that at all the times herein mentioned, and prior thereto, said hatch No. 3 of said vessel and the cargo thereat were a part of said vessel, and were maintained, supplied and provided by defendant to longshoremen for use in connection with the performance of their stevedoring work on board said vessel.

XIV. That on or about the 7th day of March, 1975, while Plaintiff was lawfully on said vessel, when he was caused to be pinned and to sustain severe personal injuries.

XV. That said accident was caused solely by reason of the carelessness and negligence on the part of the defendant, its agents, employees, the master, officers and crew of said vessel in that they failed to supply Plaintiff with a safe place to work; in that they failed to supply suitable, safe, proper and adequate winches, their drums, brakes, gears and appurtenances, booms; in that they failed to warn Plaintiff thereof; in that they failed to remedy or repair said conditions; in that they failed to avoid said accident although it was foreseeable; in that they permitted and allowed said vessel, to be, become and remain unsafe, and unseaworthy and so maintained same; in that they breached the provisions of the Joint Maritime Safety Code of the Port of New York; in that they breached strict liability without tort; in that they failed to avoid said accident although they had reasonable opportunity to do so; and in that they were careless and negligent in other respects.

XVI. That as a result thereof, Plaintiff sustained certain severe personal injuries, both internal and external, to diverse parts of his arms, head, legs and body, and he was made, sick, sore, lame and disabled and suffered a

severe shock to his nervous system, and Plaintiff believes that some of the injuries he sustained may remain permanent.

XVII. That Plaintiff was compelled to expend diverse sums of money for medical aid and attention in the endeavor to cure himself of the injuries he sustained, and may in the future be compelled to expend further sums of money for such purpose, and was, and may in the future be unable to pursue his usual vocation, to his damage.

XVIII. That by reason of the premises, Plaintiff has sustained damage in the sum of Three Hundred Thousand ($300,000.00) Dollars, besides the costs and disbursements of this action.

WHEREFORE, Plaintiff demands judgment against the defendant, for the sum of Three Hundred Thousand ($300,000.00) Dollars, besides the costs and disbursements of this action.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
Borough of Manhattan
City of New York 10038

Answer to Complaint, filed June 6, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 CIV 2349—J. SAND

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

Defendant, PRUDENTIAL LINES, INC., as and for its answer to the complaint herein:

1. Admits the allegations contained in paragraph "II", "V", "VI", "VII", "VIII", "IX", "XI", "XII", and "XIII".

2. Does not have information sufficient to form a belief as to the allegations of paragraphs "III", "IV", "XIV" and "XVII".

3. Denies the allegations contained in paragraph "I" except admits that it is a corporation duly formed under and existing by virtue of the laws of the State of Delaware.

4. Denies the allegations contained in paragraph "X", "XV", "XVI" and "XVIII".

As and for a First Complete Affirmative Defense

5. Plaintiff's complaint fails to state a cause of action upon which relief can be granted defendant, PRUDENTIAL LINES, INC.

Answer to Complaint, filed June 6, 1980

As and for a Second Complete Affirmative Defense

6. Plaintiff's alleged injury is claimed to have taken place on March 7, 1975.

7. No summons was served in this action until May 1, 1980.

8. More than three years have elapsed between the date of Plaintiff's alleged injury and the commencement of this action.

9. Defendant has been severely prejudiced as a result of Plaintiff's unreasonable delay in commencing this action.

10. This action is therefore time barred pursuant to the doctrine of laches.

As and for a Third Complete Affirmative Defense

11. Plaintiff's injury, if any, was the sole result of his own negligence, or of the negligence of his employer Northeast Stevedoring Co., Inc., in failing to properly supervise plaintiff.

12. There was no negligence on the part of defendant, Prudential Lines, Inc.

Wherefore, Defendant requests judgment in its favor, dismissing the complaint, and for the costs and disbursements of this action.

Answer to Complaint, filed June 6, 1980

Dated: New York, New York
June 4, 1980

JOHN F. McHUGH
Attorney for Defendant
Prudential Lines, Inc.
One World Trade Center
New York, New York 10048

To: ZIMMERMAN AND ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff, on January 6, 1981, in Opposition to Motion filed by Defendant on December 16, 1980, to Dismiss Complaint for Laches*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civil 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MARTIN LASSOFF, being duly sworn, deposes and says:

I am an attorney duly admitted to practice before this Court and associated with the firm of ZIMMERMAN & ZIMMERMAN, attorneys for the plaintiff herein and as such am fully familiar with all the facts and circumstances involved in this action as well as all other actions with Prudential-Grace Lines handled by Zimmerman & Zimmerman.

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* Defendant's notice of motion and supporting papers were not included in the Joint Appendix filed with the Court of Appeals on defendant's appeal to that Court, which resulted in the judgment sought to be reviewed in this Court. Defendant's motion was later denied without prejudice to renewal.

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

I make this affidavit in opposition to defendant's motion for an Order dismissing this action based on laches and plaintiff's failure to timely commence an action under the Longshoremen's and Harbor Worker's Act, making the real party in interest the stevedoring company.

Plaintiff was injured on March 7th, 1975 on board defendant's vessel, the SS SANTA BARBARA, when due to defendant's defective winches, he was caused to be crushed by a draft that fell from said winches.

This action was commenced by service of a summons on defendant on October 14, 1977, said summons bearing jurisdiction of Supreme Court of the State of New York, County of New York.

This action was Zimmerman & Zimmerman's and Prudential Lines' usual way of commencing negotiations and the summons was meant to alert Prudential to bring its file up to date, do its investigation if none had been conducted prior, and discuss settlement of this case.

At the time of the commencement of this action, defendant's Claim Manager, (See deposition of George Friedheim) was in charge of this case.

As can be seen from the deposition of George Friedheim, (complete copy of deposition attached), it was Mr. Friedheim's practice upon receipt of the summons if he had not already ordered an investigation into the facts of the accident, to order an investigation to be made by either Prudential Lines, Inc. or by an independent investigating service, General Claims Service and this was done in this matter. General Claims Service file in this matter was subpoenaed and that subpoena was returnable on August 29, 1980 before this Court, before Judge Pierce, when defendant made a motion to quash the subpoena which

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

dealt with twenty-three files commenced in the Federal Court by Zimmerman & Zimmerman with Prudential Lines, and that motion has not as yet been determined. However, in other cases where this motion has been made, defendant has conceded that an investigation had been conducted but refused to reveal what its investigation unfolded.

It is to be respectfully noted that defendant herein makes no mention of its investigation in this matter even though it had one and makes no factual statements whatsoever with regard to any of its claims as to its defense of laches. Attached hereto and made a part hereof are photostatic copies of letters supplied to Zimmerman & Zimmerman by Mr. John J. McHugh, General Counsel with Prudential Lines wherein it is clear that at the request of Prudential Lines' Claims Manager (Exhibit I, being a letter from Mr. Friedheim, Prudential's Claim Manager to Zimmerman & Zimmerman) that Prudential Lines, Inc. requested in writing an unlimited extension of time to answer in these cases and the second letter showing clearly that Zimmerman & Zimmerman gave Prudential Lines an unlimited time to answer in the exact language requested by Mr. Friedheim.

At no time after the service of the summons in this action, did Zimmerman & Zimmerman, receive any request for information since it is quite clear that Prudential Lines, Inc. had the ability to obtain whatever necessary information it required from either the stevedoring company by whom Mr. Del Re was employed, Northeast Stevedoring Company, Inc., or its insurance company, the State Insurance Fund, by either requesting copies of the medical examinations and disability or subpoenaing said information from the aforesaid corporations and insurance com-

panies with whom Prudential Lines had substantial business contacts as this was their regular stevedoring company at their regular pier.

These cases were discussed quite frequently. Mr. Friedheim, Claims Manager of Prudential Lines, had more information from both the stevedoring company and its insurance company and from its investigation than even plaintiff's attorney had.

Deponent attempted to discuss this case with a Mr. Radu Herescu, an unlicensed attorney in the claims department of Prudential Lines, but was unable to do so in 1980. Claims Manager of Prudential Lines, Mr. Friedheim, left this company in 1978 and until the advent of Mr. Herescu, various minor functionaries at Prudential Lines handled claims for Prudential for a short period of time and then left the company. Since the attempt to discuss the case after a complaint had been served on defendant on July 6th, 1979 and plaintiff had received a rejection of that complaint on August 7th, 1979, which rejection in itself was untimely, deponent determined that the only way to get this defendant to appear even though the state court action was a viable cause of action without the necessity of taking default judgments, was to commence an action in the Federal Court.

A complaint was filed on April 28th, 1980 and this case was assigned to Your Honor. Defendant once again failed to answer the complaint until June 6th, 1980 and once again was in default. Deponent's office does not believe that any fair system of disposing of claims exists except for litigation of claims and has consistently attempted to avoid taking the default judgment against defendants where it believes there are parties who should respond to legal process in legal ways.

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

The summons issuing out of the Supreme Court, New York County commenced this action on October 14, 1977 and is still in effect and is a legal and proper commencement of an action. A further complaint in Supreme Court, New York County was served on the defendant on December 12, 1980 and defendant has failed to answer this complaint.

This action being prior in time to the Federal Court action is the action in which plaintiff chooses to proceed and will proceed at this time to take a default judgment against the defendant for its failure to appear although properly served in the Supreme Court of the State of New York.

The first of these motions made by Prudential Lines, Inc. in connection with litigation in the Federal Court was heard before Judge Goettel in August of 1980 at which time Judge Goettel set his case which was the case of *Heliodoro Hernandez* v. *Prudential Lines,* down for an evidentiary hearing commencing after January 4th of 1980 so that each of the parties would have an opportunity to take the deposition of whomever it chose to be a witness in this case. Defendant has not moved to depose anybody. Plaintiff has already held depositions of Mr. George Friedheim and has noticed the deposition of Mr. Spiros Skouras, principal owner of Prudential Lines, to ascertain certain facts which have been raised in defendant's moving papers.

This deposition was noticed in the *Hernandez* case and Mr. Skouras was supposed to appear on December 22nd at the office of Zimmerman & Zimmerman for his deposition to be conducted. On Friday, December 19th, deponent received a telephone call from Mr. Radu Herescu stating that Mr. Skouras would be out of time and would not

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

appear. Deponent immediately informed Mr. Herescu that there was a time limit on these discovery proceedings set by Judge Goettel and inquired when Mr. Skouras would be produced. At this point Mr. Herescu changed what he had said before and said that the real reason for the request for an adjournment was that defendant was going to move for a Protective Order so that Mr. Skouras would not have to testify. Deponent received Prudential's Motion for a Protective Order on December 22nd, 1980 and cross-moved for an Order Striking Defendant's Answer for failure to produce the necessary witness.

The reason for taking the testimony of Mr. Skouras was that defendant claims it has been prejudiced because it sold its ship to a company known as Delta Steamship Corp. Interestingly enough, Delta Steamship Corp. now occupies the quarters in One World Trade Center, previously occupied by Prudential Lines. Prudential Lines has moved its offices one floor up from the 36th to 37th Floor while Delta operates its old offices on the 36th Floor at that Building. It is deponent's firm conviction that Mr. Skouras owns a considerable portion and has considerable interests with Delta Steamship Company which either purchased or leased the vessel in question. It is further deponent's position that the officers of this vessel and indeed some of the crew members are still employed by Prudential Lines and it is further deponent's position that any or all necessary witnesses are readily available to defendant if it chooses to produce them.

On the making of this motion, defendant has not issued one single statement that it has attempted to locate or not locate any officer or crew member who was on board the vessel when this accident occurred. It merely makes a

statement that it would be difficult possibly to locate these people. It is respectfully submitted that this is not the type of evidence to be considered on a motion to dismiss for laches. Defendant has the responsibility where an action was timely commenced, in fact, before the three-year statute of limitations, to show that it has been prejudiced in fact, and not by inference.

Defendant further states that plaintiff worked under the exclusive control and supervision of Northeast Stevedoring Company, its contract stevedore and it seems hardly likely that its contract stevedore would not furnish information it requested. Defendant refers to an investigation which says that no ship's gear was involved. Since plaintiff was injured while on the stringpiece by a descending draft of cargo from defendant's winches, this is absurd on its face. Defendant further states that it never received any information of the stevedoring company. It nowhere states that it requested any information from the stevedoring company. It never requested any information from plaintiff's office.

Defendant further states that the real party in interest should be the stevedoring company or its insurance company since the right to the cause of action passed to them. Once again it submits no proof of this contention and this is not the case. This action was commenced timely in the Supreme Court, New York County and the right of action is the plaintiff's.

The Court may ask why these actions in claim with Prudential Lines were not disposed of expeditiously. The answer to that is simple. Prudential Lines has for many years had severe problems with cash flow and has been very slow in handling these claims and even after settling

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

these claims, it has been necessary for deponent's office to move for judgment on the settlements when these settled cases were not paid within six to eighteen months of the settlement. This is further corroborated by the deposition of George Friedheim, Claims Manager, to the effect that he did not have sufficient money available to settle these claims and had to do so slowly and even when he settled them, it would take time to obtain settlement funds. This condition has worstened since Mr. Friedheim left the company and as can be seen from the nine cases where motions for judgment were made, copies of which are attached, obtaining payment in any manner from this defendant has always been most difficult.

Also, attached hereto and made a part hereof, is a statement taken of Mr. Friedheim prior to the taking of his deposition and it is interesting to note that at all times, defendant fully knew of its practices in requesting indefinite extensions of time because of even its inability to pay and procure adequate clerical help let alone the settling and paying of claims and asked for and received a substantial benefit from Zimmerman & Zimmerman, and now attempts to repudiate the benefit that it received and take any moral position stating that what it requested should not bind this defendant.

The "doctrine of laches" requires the party moving for relief on the equitable defense of laches to come forward with clean hands. Defendant, having requested an unlimited extension of time to handle these cases in claim and having never requested that this case go forward or appeared in the action, and having accepted the substantial benefit given it by having an unlimited extension of time, now seeks to repudiate its express request and to take ad-

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

vantage of a condition caused by defendant. This certainly shows a clear lack of good faith on the part of the defendant. If not, an unconscionable and unscrupulous attempt to obviate its word and to unfairly handle a situation.

As can further be seen from the deposition of Mr. George Friedheim, that it was never contemplated and never in fact allowed to occur, that any cause of action which was properly started or commenced by the service of a summons would ever have a defense of laches or statute of limitations or any defense other than that which existed at the time of the service of the State Court summons.

As can further be seen from the deposition of Mr. George Friedheim, he prepared a list from management of all pending claims each and every year and management was always aware of the pendency of each and every claim and if management wished to proceed to litigation, it had at the same option of Zimmerman & Zimmerman, that is, to put in a Notice of Appearance and notify Zimmerman & Zimmerman that the case was rejected in claim and defendant wished to litigate. As a matter of fact, in the past when this occurred, Mr. Friedheim would send his cases to the firm of Lilly, Sullivan & Purcell and Lilly, Sullivan & Purcell would file a Notice of Appearance and Zimmerman & Zimmerman would file a complaint.

Deponent has read the moving affidavit in support of defendant's motion by Mr. John F. McHugh and upon close examination, deponent cannot find one single fact listed in Mr. McHugh's affidavit to show that defendant has been or would be prejudiced and in fact, not one single attempt to obtain a fact has been shown by Mr. McHugh from either the attorneys for the plaintiff, the stevedoring company, its insurance company, its own officers and crew members or from Delta Steamship Company.

Affidavit filed by Martin Lassoff, on Behalf of Plaintiff in Opposition to Motion

To permit a defense of laches based not even on inferences but on hypotheses not warranted in any way, shape or form by evidence, would be to pervert justice.

WHEREFORE, it is respectfully requested that defendant's motion be in all respects denied and it is further respectfully requested that defendant proceed to place itself in a position to try this case expeditiously so that whatever rights the party may have may be determined before this Court.

/s/ MARTIN LASSOFF
Martin Lassoff

Sworn to before me this
29th day of December, 1980.

LYDIA MEBO
Notary Public, State of New York
No. 24-4642797
Qualified in Kings County
Commission Expires March 30, 1982

Affidavit of John F. McHugh, on Behalf of Defendants, filed on January 16, 1981, in Reply to Affidavit of Martin Lassoff, filed in Opposition to Defendant's Motion to Dismiss for Laches

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
80 Civ. 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

REPLY AFFIDAVIT

JOHN F. MCHUGH, being duly sworn, deposes and says:

1. I am the General Counsel of the Defendant Prudential Lines, Inc., the attorney of record for the Defendant in this case and an attorney duly admitted to practice before this Court.

2. As an attorney and as an officer of the Defendant I have access to the records of the Defendant and make this reply affidavit in support of Defendant's motion to dismiss due to laches and as plaintiff is not a proper party here pursuant to 33 USC 933(b), based upon all of the pleading herein, the records of this corporation and upon the affidavits submitted on this motion.

3. In reply to Defendant's motion to dismiss, the Plaintiff's counsel makes numerous allegations concerning the

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

facts all but one of which are unfounded and/or based on false assumptions. Defendant's assertions on this motion is that the Plaintiff's counsel's conduct in this case is indicative of a pattern and practice of neglect of the interests of his clients, of which this case is but one example.

4. As his only serious defense to this motion, Plaintiff's counsel raises an agreement evidenced by a letter addressed by him to the Defendant on October 15, 1974. Although the letter-agreement is very clear as to its content, plaintiff's counsel opposing affidavit asserts without any support of evidence or rational interpretation of the agreement that it precludes defendant from raising the defense of laches and that pursuant to this agreement the parties would have whatever rights they would have had at the time the summons was originally served. It is respectfully submitted that the letter-agreement does not make any express or implied reference to any waiver of any defense or to the rights of the parties except that it provides that: "This stipulation may be withdrawn by plaintiff at any time with reference to any specific case as to which we will notify you in writing."

5. Plaintiff's counsel efforts to expand the terms of this agreement to include a waiver of the Defendant's right to assert laches cannot succeed in the face of the Parol Evidence rule. The agreement does not waive any of the defendant's defenses by its terms and these terms cannot be expanded even by the Deposition of Mr. Friedheim submitted by the Plaintiff in opposition to this motion. Defendant in asserting the defenses of laches and that the plaintiff lost his right to action pursuant to 33 U.S.C.A. §933(b), is clearly not in violation of the agreement. Further the agreement by its terms gives Plaintiffs counsel

the continuing right to move any case, a right he never chose to exercise.

6. Plaintiff's counsel alleges various excuses for protracted inaction, one of which being that he has let the claim lie dormant in his files for years, allegedly due to his concern for Defendant's financial condition. In support of his contention as to the Defendant's poor payment record he affixes motions to enforce settlements made between August and October, 1980. It is respectfully submitted that these motions are irrelevant and do not support any contention that the defendant was either unwilling or unable to settle the claims filed by Plaintiff's counsel, including the instant one, in a reasonably timely fashion for a period beginning in 1973 and continuing today. It is worthy to note that during that period of time, defendant paid approximately 120 claims for a total amount of over $700,000 to various claimants represented by plaintiff's attorneys. Further, Defendant's financial condition is not an appropriate excuse for Plaintiff's failure to press this claim. Further, Plaintiff's contention that defendant's financial condition is relevant to the issue of laches, and his excuse that such financial condition prevented him from prosecuting his claim, were rejected by this Court by denying Plaintiff's subpoena to take the deposition of the President of defendant's company, Mr. Spyros Skouras, and to subpoena its records. Defendant's motion for a protective order with reference to the above subpoena was granted by the Honorable Judge Goettel on December 31, 1980.

7. Further plaintiff's counsel alleges that George Friedheim's deposition clearly indicates that under the agreement, defendant could not make a motion for laches or for failure to prosecute. It is respectfully submitted that no

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

such allegation by Mr. Friedheim was made during his deposition or in his affidavit attached to plaintiff's counsel opposing affidavit. To the contrary, George Friedheim states in his Affidavit that *"if an action was started we had an agreement with the attorney representing the injured party that either of us would demand to litigate the case and not to continue in claim"*. (See Affidavit of George Friedheim attached to plaintiff's affidavit in opposition, page 1, lines 8-11).

8. Plaintiff's counsel further alleges that prior to the commencement of this action he did discuss this case twice with Mr. Radu Herescu from defendant's office but was not successful in obtaining a resolution of this matter. It is respectfully submitted that the record indicates that no such attempts to discuss settlement of this case were made by plaintiff's attorneys and that no such settlement discussions with reference to this case were held. It is relevant to note that plaintiff's attorney attempt to discuss settlements was made through a letter dated October 29, 1979 addressed to our office listing 112 cases to be discussed at once on November 13, 1979. Even on this letter, plaintiff's name does not appear. (See Exhibit A attached hereto). There is no doubt that plaintiff's counsel did not expect seriously to discuss such a huge list of cases which was totally unrealistic. This discussion was a general discussion of the Laches issues as it related to numerous cases without any specific reference to the instant case, and cannot excuse in any way plaintiff's unreasonable delay.

9. Mr. Friedheim whose testimony is heavily relied upon by Plaintiff, indicated clearly that Plaintiff's counsel would periodically send him huge lists of cases to be discussed

for possible settlement but that few of these cases would ever be reached even when a settlement conference did occur. (See: *Deposition of George Friedheim*, page 28, lines 7-14 attached to Plaintiff's Affidavit in Opposition to the Motion). Thus, it is apparent that the mere listing of a matter on an unrealistically long agenda for a settlement conference constitutes no serious effort to move the case and certainly cannot excuse Plaintiff's protracted lack of serious action on this claim. (See Ex. A).

10. Plaintiff's counsel alleges as an excuse for his protracted delay in prosecuting his client's claim the fact that this delay conveyed a substantial benefit to defendant because PRUDENTIAL LINES did not have sufficient clerical staff to handle the claims and/or funds to pay settlements. It is respectfully submitted that plaintiff's counsel should have been concerned with his client's interests and should have acted solely on his client behalf disregarding the defendant's interests and that such excuses are absurd and totally without merit.

11. The letter agreement cited earlier, did not relieve the Plaintiff's attorney from either the obligation to press his client's claim reasonably promptly or from his obligation to the defendant not to delay prosecution of the claim for an unreasonable period of time. It clearly had no effect on this case, where a complaint was not served by Plaintiff's attorney until long after the expiration of the analogous Statute of Limitations and thus the period of laches especially in light of plaintiff's repeated refusal to provide defendant with allegations of liability and claim damage and information in support of it.

12. Plaintiff's counsel opposing affidavit alleges that the instant action is not barred by laches. It is submitted that

since plaintiff's claimed accident occurred in 1975, after the effective date of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, he has claims based exclusively upon negligence. New York CPLR §214(5) establishes a three-year statute of limitations for personal injury actions which is applicable to the instant case. Therefore the state statute of limitations which is applicable to the instant case so as to indicate the presence or absence of prejudice and inexcusable delay, had run long before plaintiff commenced the instant action.

13. Plaintiff's counsel indicates that this motion raises questions of morality and ethics which rise above law. He is wrong as the law should, and hopefully does, incorporate such principles and they include an attorney's obligation to prosecute the legitimate claims of his clients in a reasonably prompt fashion. The law and fundamental fairness includes the doctrine of finality embodied in Laches which holds that no defendant should be called upon to answer a claim so many years after the event that defense is unfairly difficult or onerous.

14. Plaintiff's counsel's opposing affidavit alleges without any support of evidence that the defendant had an investigation in this matter. It is respectfully submitted that defendant had no investigation whatsoever in this case because plaintiff did not provide defendant with any relevant information as to the occurrence of the accident and any injury to the plaintiff. Therefore, the defendant was prejudiced by the fact that it did not have an opportunity to investigate the case, and any attempt to make such an investigation at this time would be fruitless due to the passage of time.

15. Further plaintiff's counsel alleges that this motion to dismiss based on laches could not be made in the New

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

York State Supreme Court because there was no abandonment of the action by the plaintiff and no default in appearance by defendant. It is respectfully submitted that a State Supreme Court summons was served on October 14, 1977, that defendant never appeared in this action, and that plaintiff failed to take any step to prosecute its State Supreme Court action and failed to take proceedings for the entry of judgment within one year from defendant's default. Therefore the State Supreme Court action was abandoned by operation of law and should be dismissed pursuant to New York Civil Practice Law and Rules §3215(C).

16. Plaintiff's attorney further alleges that the time for a claim of laches runs from the date of commencement of the first action which was October 14, 1977. It is respectfully submitted that while the service of his State court summons was timely made and this constitutes commencement of this action it is plaintiff's failure to prosecute by following up with a complaint over five years after the alleged accident and three years after the service of the summons, that constitutes a bar to his recovery. Laches in this sense is equivalent to failure to prosecute, for which dismissal is proper.

17. Plaintiff's counsel further alleges that defendant was not prejudiced by his delay in prosecuting this claim because Mr. Friedheim "had more information from both the stevedoring company and its insurance company and from its investigation than even plaintiff's attorney had." No support for that statement can be found in Mr. Friedheim's testimony. It is submitted that defendant never received any compensation record or medical records from either the stevedoring company or its insurance carrier.

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

18. It is respectfully submitted that plaintiff has not submitted an adequate excuse for his delay. His excuse, such as it is, is certainly inadequate in the face of defendant's clearly demonstrated prejudice.

19. Plaintiff is also not a proper party to pursue this action as stated in our initial motion papers, as the plaintiff was an employee of a stevedoring company, NORTHEAST STEVEDORING COMPANY, INC., and is seeking recovery from the owner of the vessel, by commencing the instant action on April 28, 1980. Although defendant was not provided with the requested information and/or authorization to examine plaintiff's compensation records, there is a strong indication that this action was filed several years after termination of compensation payments made to plaintiff by his employer. It is respectfully submitted that under the Longshoreman's and Harbor Workers' Act, acceptance of a compensation award by an employee operates as an assignment to the employer or its insurance carrier of all rights of the employee to recover damages against a third-party unless the employee commences suit against the third-party within six months after award.

20. The service of a summons without notice on October 1, 1977 in the State Supreme Court, predating the compensation awards, has no bearing on the instant action. The fact that plaintiff neglected for over five years to take any serious action to press the State Supreme Court action is a clear abandonment of the action and requires its dismissal for failure to prosecute and laches. Further pursuant to Rule 3 of the Federal Rules of Civil Procedure *"A civil action is commended by filing a complaint with the court". No complaint was filed in this case until April 28, 1980.* It is respectfully submitted that plaintiff cannot

Affidavit of John F. McHugh, on Behalf of Defendants, in Reply to Affidavit of Martin Lassoff

prosecute the instant case relying on an abandoned action in the State Supreme Court barred by laches for failure to prosecute and that the provisions of the Federal Longshoreman's and Harbor Workers' Compensation Act, 33 USCA §933(b) should be applied to the instant action which will bar plaintiff's claim.

WHEREFORE, your deponent respectfully requests that this motion be granted dismissing this complaint pursuant to the Doctrine of Laches and pursuant to the Federal Longshoreman's and Harbor Workers Compensation Act, 33 U.S.C.A. §933(b).

JOHN F. McHUGH, Esq.
General Counsel
c/o Prudential Lines, Inc.
One World Trade Center
Suite 3701
New York, New York 10048

Sworn before me
this 14th day of January 1981

.....

Notary Public

Defendant's Renewed Notice of Motion to Dismiss Complaint (filed May 8, 1981)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of John M. McHugh, and the exhibits attached hereto (A, B, C, D, and E) and the memorandum of law in support thereof, and upon all prior pleadings and proceedings, the undersigned will move this Court at a motion part thereof to be held at the Courthouse, Foley Square, on May 21, 1981, at 2:15 in afternoon of that day for an order dismissing this action on the ground that plaintiff fails to state a cause of action upon which relief can be granted under FRCP 12(b)(6) since he has lost his right of action pursuant to 33 U.S.C. 933(b), with costs, and for such other and further relief as to the Court may seem just and proper.

Please take further notice that you are required to serve your answering papers, if any, 3 days prior to the return date of this motion.

Defendant's Renewed Notice of Motion to Dismiss Complaint

Dated: New York, New York
May 7, 1981

JOHN F. McHUGH
General Counsel
Prudential Lines, Inc.
One World Trade Center
Suite 3701
New York, NY 10048
(212) 775-0550

To:

ZIMMERMAN & ZIMMERMAN
Attorney for Plaintiff
160 Broadway
New York, NY 10038

Affidavit of John F. McHugh filed December 16, 1980, in Support of Defendant's Renewed Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 2349 (LBS)

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

JOHN F. McHUGH, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this court and the Secretary and General Counsel for the defendant, and as such am familiar with the facts pertaining to this motion as the result of having reviewed the records of this company with regard to this action. I am the attorney of record for the defendant in this action.

2. I make this affidavit in support of a motion by the defendant dismissing this action on the ground that plaintiff fails to state a cause of action upon which relief may be granted as against the defendant and that he has lost his right of action pursuant to the provisions of 33 U.S.C. 933(b).

4. A motion to dismiss this action based on laches and 33 U.S.C. 933(b) was previously filed with this Court by the defendant on December 16, 1980.

Affidavit of John F. McHugh in Support of Defendant's Renewed Motion to Dismiss Complaint

5. At that time, defendant was not yet in receipt of plaintiff's compensation records, and could only allege upon information and belief that plaintiff filed his action more than six months after he received his final award of compensation.

6. On January 30, 1981, defendant's motion was denied without prejudice to renew it, on the ground that "the strongest allegation defendant can make . . . is that 'there is strong indication that this action' was not timely filed." (See Exhibit A hereto, pg. 4).

7. In the intervening period of time between the denial of defendant's previous motion and the instant motion, defendant has obtained plaintiff's compensation records and a copy of his final compensation award from the U.S. Department of Labor.

8. Defendant now renews its motion to dismiss plaintiff's complaint on the ground that he is an improper party to pursue this action pursuant to 33 U.S.C. 933(b) since he brought his action more than six months after receiving his final award of compensation.

9. This action was brought for injuries allegedly sustained by the plaintiff while performing stevedoring work aboard defendant's vessel the S. S. Santa Barbara on or about March 7, 1975.

10. The instant action was commenced by the filing of a summons and complaint on April 28, 1980. (Exhibit B hereto).

11. A state court action alleging the same set of facts was commenced by the service of a summons upon defendant on October 17, 1977. (Exhibit C hereto).

Affidavit of John F. McHugh in Support of Defendant's Renewed Motion to Dismiss Complaint

12. Plaintiff's State Supreme Court action was voluntarily dismissed by the plaintiff, with prejudice, a copy of which was filed in State Supreme Court, New York County, on March 4, 1980. (Exhibit D hereto).

13. Plaintiff is not a proper party to pursue this action as the plaintiff is an employee of a stevedoring company and is not seeking recovery from the owners of the vessel on which he was allegedly injured. Plaintiff's failure to bring this action against the vessel owner within six months after the compensation award resulted in a statutory assignment to his employer of his exclusive right to proceed against the vessel owner pursuant to section 933(b) of the Longshoremen's & Harbor Worker's Compensation Act, 33 U.S.C. 901 *et seq.*

14. Plaintiff received his final award of compensation on February 25, 1977. (Exhibit E hereto). This action was brought more than two years and eight months after that award. Plaintiff is therefore, statutorily barred from bringing this action.

15. Plaintiff may argue that his action was commenced by the service of a State Court Summons on defendant on October 17, 1977.

16. However, plaintiff's action would still be barred under 933(b) since the summons was served eight months after plaintiff received his final award of compensation.

WHEREFORE, your deponent respectfully requests that this motion be granted dismissing plaintiff's complaint on the ground that he fails to state a cause of action upon which relief may be granted, and on the ground that the

plaintiff is not the proper party to pursue this action pursuant to 33 U.S.C. 933(b).

JOHN F. McHUGH
General Counsel
Prudential Lines, Inc.
One World Trade Center
Suite 3701
New York, NY 10048
(212) 775-0550

Sworn to before me this
day of May, 1981

.....

Notary Public

Affirmation of Howard Fishkin, on Behalf of Plaintiff, filed May 19, 1981, in Opposition to Defendant's Renewed Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 2349
Judge Sand

ANGELO DEL RE,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.,

Defendant.

HOWARD FISHKIN, an attorney duly admitted to practice before this Court, and an associate of Zimmerman & Zimmerman, attorneys for plaintiff, hereby affirms the following statements upon information and belief:

1. The State Court action was discontinued pursuant to your Honor's order dated January 30, 1981. The discontinuance does not state "with prejudice". The discontinuance of the State Court action should not in any manner prejudice the instant action pending before your Honor.

2. The State Insurance Fund which was the Worker's Compensation Carrier for plaintiff's employer at the time of this accident "has ratified" this pending action. The State Insurance Fund will not commence its own action arising out of this accident as long as the plaintiff's action is permitted to continue. The State Insurance Fund agrees

Affirmation of Howard Fishkin, on Behalf of Plaintiff, in Opposition to Defendant's Renewed Motion to Dismiss Complaint

to be bound by the results of this action insofar as it determines the "fault" or lack of it with regard to the happening of the accident (annexed is the letter from the State Insurance Fund to that effect marked Plaintiff's Exhibit 1).

It is evident based on the copies of the decisions annexed to Plaintiff's Memorandum of Law that the State Insurance Fund ratification and agreement not to commence its own lawsuit prevents a duplication of the lawsuit herein (by different parties). Defendant, therefore, is not subject to a multiplicity of lawsuits by the plaintiff and the compensation carrier.

WHEREFORE, affiant requests that the instant motion be denied in each and every respect.

/s/ HOWARD FISHKIN
Howard Fishkin

Dated: New York, New York

May 18, 1981

Letter From State Insurance Fund (the Workmen's Compensation Carrier for Plaintiff's Employer), dated May 12, 1981, to Zimmerman & Zimmerman, Attorneys for Plaintiff, Ratifying Commencement and Continuance of Plaintiff's Action Against Defendant

THE STATE INSURANCE FUND
199 Church Street
New York, N. Y. 10007

May 12, 1981

Zimmerman & Zimmerman
160 Broadway
New York, N.Y. 10038

Attention: Irving Kernis, Esq.

Re: Acc. #9 461 233-45
Your File #2-39033
Angelo Del Re v.
Prudential Lines, Inc.

Dear Sir:

We were the Longshoremen's Act Insurer of Northeast Stevedoring Co., Inc. the employer of plaintiff claimant on March 7, 1975, the date he was injured while working aboard a Prudential vessel.

We hereby ratify plaintiff-claimant's commencement and continuance of his action against Prudential Lines, Inc. to recover damages for the personal injuries he sustained as a consequence of the accident.

If our ratification is sufficient to preserve to plaintiff-claimant ownership of the cause of action, we shall, of course, not institute a separate action against Prudential

Letter From State Insurance Fund (the Workmen's Compensation Carrier for Plaintiff's Employer)

Lines, and we will be bound by any judgment which may be rendered in said action insofar as it determines liability, or lack thereof, for the accident, and the damages recoverable, if any. We understand also that we would be bound by any release executed by the plaintiff-claimant with our approval. Our lien and credit rights are, however, to attach to the proceeds of any recovery by way of judgment or settlement and are not in any way hereby released or relinquished.

Very truly yours,

/s/ Raymond C. Green
Raymond C. Green
Supervising Attorney

State Court Summons

SUPREME COURT
OF THE STATE OF NEW YORK

County of New York

Angelo Del Re,

Plaintiff,

—against—

Prudential Lines, Inc.,

Defendant.

Plaintiff designates New York County as the place of trial.

The basis of the venue is Defendant's address.

Plaintiff resides at 95 First Place, Brooklyn, New York.

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded herein.

State Court Summons

Dated, New York, New York
October 14, 1977

Defendant's Address:
One World Trade Center
New York, New York

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038
(212) 227-1350